VESTED RIGHTS: A REFUTATION OF VICE-PRESIDENT MARSHALL'S VIEWS

BY CYRIL F. DOS PASSOS

"THAT this question may not be settled by me, let me ask their lawyers: Suppose a Governor and a General Assembly in the State of New York should repeal the statute of descents for real and personal property and the statute with reference to the making of wills, on their (thoughtless rich men's) death how much vested interest would any relative have in the property which fell from their nerveless hands at the hour of dissolution? The right to inherit and the right to devise are neither inherent nor Constitutional, but upon the contrary, they are simply privileges given by the state to its citizens."—*New York Times, April 13, 1913.*

The foregoing paragraph is an extract from Vice-President Marshall's speech which he delivered before the National Democratic Club in April, and which the newspapers sought to feature in prominent head-lines to the following effect:

"The Right to Inherit and the Right to Devise are not Constitutional and can be taken away."

It is indeed curious that no lawyer has come forward to pick up this challenge and answer it as it should be answered, not superficially, but by a careful examination of the principles upon which the laws of inheritance stand. The reason is only too apparent. The Bar generally, believes Mr. Marshall to be correct. In fact, its views have already been expressed in an editorial in *Bench and Bar* (May, 1913, p. 88), a representative legal journal:

"While most laymen are perhaps not aware of it all lawyers of course know that neither the power to make a will nor the right to take by descent, is a vested or constitutional right."

And the learned editor also remarks that "no one has yet arisen to challenge the legal accuracy" of this statement.

My study of this interesting question has convinced me that Mr. Marshall's views are erroneous and are contrary

to the best reasoned authorities. If they are sound and are to prevail it must be admitted on all sides that a serious flaw has been discovered in our system of government. Unless corrected immediately, these views will soon spread over our entire community, and not impossibly find definite adoption in some of our statutes. Such a belief is far more dangerous than that which has but recently stalked over the land under the name "Judicial Recall." That unfortunate panacea if adopted would only poison one branch of our institutions and might not immediately spread its infection to other parts; in time it might even die a natural death. On the other hand the views of Mr. Marshall, if adopted, would destroy our institutions at one blow. There can be no question but that a revolution—a justifiable revolution—would immediately follow the abolition of the rights to devise and inherit, in which law and order would stand opposed to anarchy and socialism.

The authorities in this country, apparently sustaining Mr. Marshall's views, are principally the so-called inheritance-tax cases, of which Magoun *v.* Illinois, etc., Bank (170 U. S. 283) in the Supreme Court of the United States, and Matter of Delano (176 N. Y. 486) in the New York Court of Appeals are examples. In the former case the court, speaking by Mr. Justice McKenna, says:

> "The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."

Even stronger language is used in the latter case, where it is said:

> "The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion."

But in spite of this seeming authority in Mr. Marshall's favor, I venture to suggest that the inheritance-tax cases are not decisive of this question for a very obvious reason. Those cases did not involve the question at issue here, *i. e.*, the right to devise or inherit; the only question they involved was the right of the State to impose a tax upon property transferred by will or intestacy. In none of them, and in no reported case I have been able to discover, has a statute abolishing the right to devise by will, or the right to inherit in case of intestacy, been before a court or has such a law even been passed by a legislature. Unless such

a case has been decided by a recognized and authoritative tribunal, the matter, so far as it is a legal question, remains open and undetermined. For this reason, under the familiar legal doctrine of *stare decisis,* these apparently conclusive authorities in Mr. Marshall's favor have no value whatsoever. That doctrine, properly applied, is limited to the right principle on which a particular decision rests and does not extend even to the application of such principle. It relates only to the principle itself. If the facts in a later case are different the doctrine of *stare decisis* does not necessarily apply. Here the facts are essentially different. In the inheritance-tax cases the taxing power of the State was at issue. Here, as will be shown, a property right is at issue. The taxing power is recognized to be almost entirely within the discretion of the Legislature. The Legislature has power to tax all kinds of property, whatsoever, whether tangible or intangible. Thus it may, in its discretion, tax a share of stock as personal property, or it may tax the right to transfer that share. In the latter case the tax is usually assessed upon the market value of the certificate. While theoretically the naked right of transfer is of equal value in both cases, yet as a matter of fact the value of the right of transfer depends upon the actual value of the property transferred. So, conceding the power of the State to impose inheritance taxes and to fix the amount of the tax by the value of the property transferred, it does not follow by any means that the rights to devise and inherit can be abolished.

Another argument, which is found in the history of the law in England, and which has specific reference to wills, should be answered at this place. It is frequently asserted that in England, at least, wills had their origin in the statute of 32 Henry VIII. This is not the fact. Wills were known and recognized by the Saxon law long before the Conquest. They seem to have disappeared or to have gone out of use, however, during the reign of William I. as being inconsistent with the feudal system introduced from the Continent by that Prince.[1]

At the outset of this discussion, it is important to grasp and firmly keep in mind the true meaning of "inherent" and "constitutional" rights. I understand by an inherent

[1] Pollock and Maitland, History of English Law before the Time of Edward I., Book II. Ch. VI. "Inheritance" Section 3 "The Last Will."

right nothing more or less than a natural or absolute right; one that inheres in us under the laws of nature as human beings. By a constitutional right is meant a right protected or conferred by the Constitution, either State or Federal. Both classes of rights may in certain cases be covered by either term though they are not always synonymous. Thus the rights to life, liberty, and property within certain limitations are both natural, absolute, or inherent, and constitutional rights. This thought was well expressed by Mr. Justice Dixon in Percey *v.* Powers (51 N. J. L. 432, 433) in commenting upon the distinction between natural and civil rights:

"By civil rights, I understand those rights which the municipal law will enforce, at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness. They are distinguishable from natural rights which would exist if there were no municipal law, some of which are abrogated by the municipal law, while others lay outside of its scope, and still others are enforceable under it as civil rights."

It is of course understood that civil rights in their broader sense include constitutional rights, though they may, and indeed often do, include other rights not protected by the constitution.

The question then presents itself, how are natural rights to be known and ascertained? The answer is, by the study of the law of nature. The law of nature has been defined in substance as that prescribed by the Creator, and is said to be discoverable by the light of reason (Blackstone's Commentaries, Book I., p. 39). He says further on, that this law prescribes "that man should pursue his own true and substantial happiness" (p. 41).

Upon the merits, then, what can be said in favor of a natural or inherent right to bequeath property by will or to succeed to it by reason of intestacy? In the first place, I maintain that the power of disposition is inherent in the right of property itself. It is one of the most important elements which go to make up the value of property. Would a law be sound or constitutional which forbade the transfer of property *inter vivos?* If not, why then make an exception in the case of transfers *mortis causâ.* There is no real distinction. An apparent distinction arises from the fact that the visible or physical transfer does not take place at the moment of dissolution. But the actual and legal

transfer does take place at that very moment. There is no hiatus during which no one has a title to the property. The right of the property is of course protected by our Constitutions, State and Federal. If this argument be sound, such protection alone is sufficient to refute Mr. Marshall.

What is one of the principal reasons which leads men to acquire and hold property? Is it not to provide for their families during their lives and for their wives and children after their death? Can there be any doubt but that such is the first wish and desire of every man? Does not that laudable ambition govern his actions in daily life, and is it not one of the strongest reasons for making him a good, valuable, and law-abiding citizen? Take away from men this incentive and you strike with a single blow at the very foundations of society. You do away with all republican ideas and institutions—institutions protected by express words in the Federal Constitution which provides that "The United States shall guarantee to every state in the Union a republican form of government." (Article VI. Sec. 4.)

The origin in England, and the fate in the United States, of the doctrine of primogeniture furnishes another illustration of the natural intentions of mankind as to the distribution of their property at death. Primogeniture, or the right of the eldest son to succeed to the real property of his intestate father to the exclusion of his brothers and sisters, was introduced into England by the feudal system. It is supposed to have been unknown, or not in use, among the ancient Germans or the Anglo-Saxons prior to the Norman Conquest. But such a doctrine of descent was "considered to be incompatible with that equality of right and that universal participation in civil privileges, which is the constitutional policy of this country to preserve and inculcate" (4 Kent's Commentaries, p. 383). If such are our sentiments and constitutional policy, how can it be claimed that we have no vested right to devise property by will or inherit it in case of intestacy? The very repudiation of the doctrine of primogeniture by every State in this country shows too clearly to be misunderstood—the deep-rooted belief in equality of inheritance and the accomplishment of a long-felt desire to reinstate the original, and indeed the natural, rule of our mother country in place of the artificial one instituted by the feudal system.

Some may come forward and say, "Yes, that is all well enough, but you overlook the taxing power, inherent in every government," and further, "The taxing power is omnipotent—the power to tax is the power to destroy." It is upon this theory that the Vice-President bases his conclusion. Such an assertion I must deny. It will not stand examination. It overlooks the true ends and purposes of all government. Government is instituted among men for the purpose of securing to them civil liberty, which indeed is only natural liberty so far restrained by just and equal laws as is necessary for the good and advancement of the whole state. When government exceeds those ends it becomes tyrannical and it is the right of the people to terminate it—and that even by revolution if need be. If property were to be taxed out of existence the government would have reached its end. An apt illustration is the French Revolution, one of the chief causes of which was the excessive and prohibitive taxes exacted by the upper class from the lower.

Constitutional lawyers have overlooked the fact that there are natural rights unmentioned by Constitutions and other organic laws, but which the Legislature would not for an instant dare to assail. It will suffice to refer to but one or two. Take for instance marriage, not the formal or ceremonial marriage, but the relationship established between man and woman. Is not this a natural right? While we frequently call it a civil contract, yet it has its origin in nature and was given this appellation only to remove it from ecclesiastical jurisdiction. Marriage or the family relationship is certainly a natural right of the highest order and recognized as such in every State. Can any one point to a guarantee of that right in any organic law? Yet will any one be bold enough to assert that it could be wiped out by a legislative fiat? Closely related to marriage, and indeed its chief end, is the right to have children. Can that be limited or enforced by human laws? Has such a right any protection in any of our Constitutions? No one will deny that, for reasons of health and public policy, reasonable limitations may be put upon both these rights. It would undoubtedly be proper to provide that certain persons suffering from incurable diseases should not marry. It would also be proper to provide a statutory form for the celebration of marriages and to

compel persons to procure a license for which they may even be forced to pay a small license fee or tax. But will any one have the temerity to maintain that this tax could be so increased as to prohibit marriage? Does not that dispose of the argument that the power to tax is the power to destroy? Would not such a law abolish our republican form of government and strike deep into our civilization?

After pursuing these views upon the subject, it is interesting to examine the opinions of various eminent writers upon the subject of natural law.

James Lorimer, a Scotchman, published his second edition of *The Institutes of Law, a Treatise of the Principles of Jurisprudence as Determined by Nature,* in 1880, so that it is a recent work and therefore represents modern thought. Under the chapter entitled "Of the Rights and Duties which Nature Reveals," we find this statement (p. 229):

"(g) *The right to produce and multiply our being involves the right of transmitting to our offspring the conditions of the existence which we confer.*

"As regards our children and our direct descendants, the right of transmitting property springs as obviously from the right of transmitting life, as the right to possess property springs from the right to possess life. . . . We are entitled not only to live, but to live humanly; and the life which we are entitled to transmit is not bare existence in the abstract, but human existence. . . . What is commonly and quite correctly regarded as a duty to our children, is thus at the same time a right inherent in ourselves, which we are entitled to assert as against other created existences; and our laws of inheritance, as well as our laws of property, have thus their root in the subjective *persona,* and their validity when seen simply from the subjective side."

"(i) *The right to be involves the right to dispose of the fruits of being,* mortis causâ. (p. 233).

"The right of executing *mortis causâ* dispositions would at first sight seem to be excluded by a doctrine which declares that all rights originate in life, that they continued to be measured by life and terminate with life. . . . And here the first consideration which presents itself is that a *mortis causâ* deed is a transaction, not between a dead man and a living man, but between two living men,—the man who gives at the moment of giving, and the man who receives at the moment of receiving, are both in possession of the powers of life—to the extent, at all events, of being capable of consent. The only difference between it and what are usually known as transactions *inter vivos* arises from the fact that the one man must have lost his power of giving before the other can exercise his power of receiving. But this difference loses its importance when we consider that, substantially, the same thing takes place in every transference. In the very act of transferring a pound of tea, we shall say, the proprietor, *quâ* proprietor, expires—his proprietorship ceases, just as much as if he had

dropped down dead. . . . As regards their origin, there is thus no difference at all between rights of transmitting the fruits of life *inter vivos* and *mortis causâ.*"

The following is a brief extract from the opinion of that celebrated judge, Lord Mansfield, delivered in the case of Windham *v.* Chetwynd (1 Burr 414 at 419):

"First—Considering the matter *at large;* let me observe that the power of devising ought to be favored.

"It is a natural consequence of property, and the right a man has over his *own.* It was a right by the law of the land before the Conquest and down to about the time of *Henry the 2d*—"

Looking from England across the channel to Continental Europe we find the work of J. J. Burlamaqui on *Principes du Droit de la Nature et des Gens.* This famous author needs no eulogium to establish his authority. In his third book (Ed. Paris, 1820), at page 193, he says:

"OF WILLS.

"XII. . . . The power of disposing of one's effects by a will, follows naturally from the right of ownership and from social order. For in the first place, every one will concede that any one can transfer to another *inter vivos,* from hand to hand, either absolutely or subject to certain conditions, the ownership which he has over his own property. If that is true, why should he not be permitted to transfer in case of death? *Secondly,* The intended destination to his successor which an owner has of his goods must give the latter certain rights even during the testator's lifetime; and if he preserves his intention until his death and the successor accepts, the transfer of property becomes absolute; and no one could without injustice take possession of the goods of the deceased adversely to the successor. *Thirdly,* If the goods of a decedent belonged after his death to the first occupant, which would be equivalent to the right of pillage, the result would be a source of disorder, quarrels, and inconveniences. Children and other persons, for whose maintenance the deceased was bound to provide, by reason of natural obligation, would often be deprived of that which he had intended them to own, and which he had acquired by his labor and saved it by his care.

"It is on these foundations that the majority of nations have placed the power of the testator as a natural right by which one to a certain extent reconciles himself to the necessity in which he is placed of abandoning his goods by death."

"OF SUCCESSIONS AB INTESTAT. (P. 203.)

"XV.—But if some one dies without having disposed of his goods to whom should they belong? It cannot be presumed that under these circumstances the proprietor intended to abandon his goods to the first occupant and leave them as it were to the right of pillage. This would be equally contrary to the natural inclination of men, to the good of families, peace of society and to duty. It is certainly more reasonable to think

if some one who dies *ab intestat* his intention is that his goods should pass to those who were dearest to him if we are to judge by the natural feelings of mankind and even by their sense of duty. It is by following this principle that the majority of nations have established, by means of laws of successions *ab intestat,* that the goods should pass to the nearest relatives of the deceased.

"Nature itself points out this rule. It inspires us with the inclination of working for the good and interest of our family, in the most advantageous manner possible, hoping to leave it in a prosperous condition.

"Duty joins itself to inclination in regard to children whose up-bringing and education are strongly enjoined by nature itself upon fathers and mothers, which in addition inspires them with the most tender sentiments. Those children are therefore the first, as they are the nearest, successors of a person who dies *ab intestat.*"

To the same effect is Henri Ahrens' *Course de Droit Naturel ou de Philosophie du Droit* (16th Ed., Leipzig, 1868, Vol. 2, p. 298).

There are many more authorities upon this interesting question. To quote from them all would be both tiresome to the reader and unnecessary for the purpose of this paper. Suffice it to quote a sentence from an opinion of that learned jurist, Mr. Surrogate Fowler, delivered in the Matter of Gedney (N. Y. L. J. May 13, 1913), when this article was in course of preparation.

"The question, whether inheritance is an inherent right or a grant from public society, has been already considered by such great jurists as Theophilus, Cicero, Grotius, Vinnius, Cujas, Puffendorf, Bynekerschoek, Leibnitz, Doneau, Lord Mansfield, Montesquieu, Merlin, Toullier, Proudhon, and other equally great jurists and philosophers of all times and places, and the best thought of the world at the present time is generally conceded to be expressed by the conclusion that the right to dispose of property after death is a natural and inherent right of mankind which cannot be taken away by the state. It is said by one of the greatest of the world's jurists, Troplong, that no country is entitled to be regarded as free where a right to dispose of property by will does not exist."

In the foregoing pages I have endeavored to show that the right to devise and inherit are not only natural rights but also rights protected and guaranteed by the Constitutions of this country. These rights do not appear to be of equal obligation, for the right to inherit in case of intestacy can, of course, only be effective where no devise has been made. It has been shown that the inheritance-tax cases do not apply or control this question because they do not involve the present issue; that the statute of wills was only declaratory of the common law; and that the taxing power, if pushed to its logical conclu-

sion, would be destructive of all government. On the other hand we have seen that the right of property, admitted in all quarters to be a natural and inherent right, involves in its very nature and as one of its most important elements the right to transfer that property; that there is no essential difference between a transfer *inter vivos* and one *mortis causâ* for the very good reason that in either case the right of the original proprietor expires at the moment of transfer, and finally that the right, not absolutely and beyond control, but under proper legislative supervision has been recognized by all states that are entitled to be called in the least degree civilized and has been denied by none. It therefore follows that these rights are property rights and as such fully protected by the identical wording of the Federal (Fourth Amendment), and New York State, Constitutions (Art. 1, Sec. 6) which provide:

"No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

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